

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

STATUTORY REVIEW OF THE SYSTEM       )  
FOR REGULATING RATES AND CLASSES    )   Docket No. RM2017-3  
FOR MARKET DOMINANT PRODUCTS       )

**SUPPLEMENTAL COMMENTS OF  
ALLIANCE OF NONPROFIT MAILERS,  
AMERICAN CATALOG MAILERS ASSOCIATION, INC.,  
ASSOCIATION FOR POSTAL COMMERCE,  
DATA & MARKETING ASSOCIATION,  
IDEALLIANCE, AND  
MPA—THE ASSOCIATION OF MAGAZINE MEDIA  
IN RESPONSE TO ORDER NO. 4574**

**April 30, 2018**

The undersigned parties submit these supplemental comments in response to Order No. 4574. The order, issued on April 13, granted the March 16 motion of three of the undersigned parties to unseal Appendix A to the Postal Service’s March 1 initial comments and Appendix G to the Postal Service’s March 20, 2017 comments.<sup>1</sup> The order also authorized interested persons to file supplemental comments “specifically limited to discussion of Appendices A and G” within ten days after the Postal Service’s public filing of the appendices, which occurred on April 18.

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<sup>1</sup> Motion of the Association for Postal Commerce, Alliance of Nonprofit Mailers, and MPA—The Association of Magazine Media for Early Termination of Non-Public Status of Two Documents Filed Under Seal (March 16, 2018).

(A)

The Commission's decision to require full public disclosure of Appendices A and G was correct for the reasons explained in Order No. 4574. Unfortunately, the Commission has never ruled on the undersigned parties' March 8 companion motion to compel the Postal Service to produce the data, assumptions and analyses *underlying* the charts.<sup>2</sup> Without this information, nothing more can be said about the charts that has not already been said in the undersigned parties' March 30 reply comments.

As the Commission notes, Appendix A consists of a two charts depicting the losses and negative liquidity that the Postal Service assertedly would suffer under the existing regulatory system and under the alternative system proposed in Order No. 4258. Appendix G consisted of similar projections of Postal Service's asserted financial performance under the existing regulatory system. Order No. 4574 at 2-3, 6-7.

The charts, however, are just colored lines on a two-dimensional white background. The data, assumptions and calculations underlying the values depicted in the charts are largely a black box. The Postal Service's original filing on March 1 included no workpapers for the charts at all. *See* USPS at 54-55 (listing some variables supposedly modeled in Appendix A without revealing their values or the formulas in which they were used).

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<sup>2</sup> Motion of Alliance of Nonprofit Mailers, Association for Postal Commerce, and MPA—the Association of Magazine Media for Issuance of Information Request (filed March 8, 2018).

On March 16, the Postal Service responded to the undersigned parties' March 8 motion for information requests by filing what the Postal Service described as the "data and the quantitative assumptions underlying the net-loss figures reflected in Appendix A."<sup>3</sup> The March 16 filing was an elaborate head fake. The supposed "workpapers" were merely conclusory summaries that left many of the most critical data, assumptions and calculations underlying the loss and liquidity projections in USPS Appendices A and G unverified and unverifiable. Appendix B to the March 30 reply comments of the undersigned parties identified some of the most serious of these foundational gaps. Neither the Postal Service nor the Commission have disputed this showing, and the Postal Service has not supplemented its March 16 "workpapers." The black box is still largely a black box.

The lack of an adequately verifiable foundation for Appendices A and G precludes the Commission from relying on them as support for the Postal Service's claims. Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, bars an agency from relying on "technical studies and data" in a notice-and-comment rulemaking without "reveal[ing]" them "for public evaluation." *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (citations omitted). "Public notice and comment regarding relied-upon technical analysis ... "are '[t]he safety valves in the use of ... sophisticated

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<sup>3</sup> Response of the USPS to Motion of ANM *et al.* for Issuance of Information Request (March 15, 2018); Notice of the USPS of Filing Non-Public Materials (March 16, 2018); accord, Order No. 4574 at 5 (describing the supplemental filing as "two documents (a pdf file and an Excel spreadsheet) containing the assumptions and showing the derivation of the charts from financial data").

methodology.” *Id.* (citations omitted). It is “a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.” *Id.* at 237; *accord*, *California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072, 1090-91 & n. 12 (9th Cir. 2011). “To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.” *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982). *See also TNS Media Research, LLC v. TRA Global, Inc.*, 984 F.Supp.2d 205, 238-39 (S.D.N.Y. 2013) (dismissing a party’s claim because of the party’s “Dance of the Seven Veils” tactics in response to the requests of opposing parties for documentation of the claim).

The Postal Service, undoubtedly aware that encouraging the Commission to rely on Appendices A and G without providing adequate supporting workpapers for the charts was a mistake, has backpedaled from its original claims about the probative value of the appendices. The Postal Service now maintains that its purpose for offering Appendix A was “limited”; the appendix merely “illustrates the general magnitude to which the Commission’s proposed alteration of the system is deficient based on the assumptions” of that model; and the Postal Service “did not propose that the Commission design a

modified system predicated on the set of projections in Appendix A” and never intended to have the Commission “rely on projected volumes or costs for purposes of establishing an appropriate revenue target or rate design over the next 5 years.” Notice of the USPS of Filing Non-Public Materials (March 16, 2018) at 1 & 3; *accord*, USPS Response to Motion of PostCom *et al.* for Early Termination of Non-Public Status of Two Documents Filed Under Seal (March 23, 2018) at 3 (“Appendix A is used only to ‘illustrate the likely impact of ... the shortcomings’ in the Commission’s proposed system, not as an independent basis for those shortcomings.”). Given the D.C. Circuit precedents cited above, the Postal Service’s belated downgrading<sup>4</sup> of the role of Appendix A to a mere “illustration” without probative value was the only prudent course.

(B)

As ill-documented as Appendix A is, it nonetheless amounts to a powerful if inadvertent admission by the Postal Service. The appendix confirms the hollowness of the Postal Service’s claimed need for steeper rate increases on market-dominant mail products. As explained above, a valid estimate of the Postal Service’s legitimate financial needs must reflect the Postal Service’s actual projected growth in revenue and reasonable assumptions about the productivity growth and cost control that the Postal Service

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<sup>4</sup> The original role of Appendix A in the Postal Service’s case was hardly as modest as the Postal Service now claims. See USPS at 7-8 (stating without qualification that “Appendix A contains two charts projecting the Postal Service’s losses and liquidity over five years, assuming the continuation of the current system or, alternatively, the addition of 2 percent points of supplemental rate authority”); *id.* at 54-55, 63-64, 66 n. 170, 68 n. 173, 70 n. 175.

could reasonably achieve. Modifying a few of the stated assumptions of Appendix A in this direction, while leaving the other values and assumptions underlying the appendix unchanged, transforms the Postal Service's projected financial results during the period at issue from the losses projected in the appendix to healthy profits. Because the Postal Service has filed both the appendix and the "workpapers" ostensibly supporting it as nonpublic documents, we cannot disclose our analysis or results here. But they are set forth in nonpublic Appendix B to the March 30 reply comments of the undersigned parties.

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